IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs February 20, 2007

JACK WARREN v. STATE OF TENNESSEE

Direct Appeal from the Criminal Court for Davidson County
No. 2004-A-242 Steve R. Dozier, Judge

No. M2006-00861-CCA-R3-PC - Filed March 2, 2007

The petitioner, Jack Warren, appeals the order dismissing his petition for post-conviction relief, arguing that because he received the ineffective assistance of counsel and was medicated, his guilty plea was not knowingly and voluntarily entered. Following our review, we affirm the post-conviction court's order of dismissal.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

ALAN E. GLENN, J., delivered the opinion of the court, in which DAVID H. WELLES and THOMAS T. WOODALL, JJ., joined.

Michael A. Colavecchio, Nashville, Tennessee, for the appellant, Jack Warren.

Robert E. Cooper, Jr., Attorney General and Reporter; Jennifer L. Bledsoe, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Pamela Sue Anderson, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTS

Marquez Delane Wilkerson was stabbed and killed on August 1, 2003. A grand jury subsequently indicted the petitioner for first degree premeditated murder, which was amended to second degree murder. On May 13, 2005, the petitioner pled guilty to second degree murder and was sentenced as a violent offender to twenty-one years in the Department of Correction.

At the submission hearing, the State recited the following factual basis for the petitioner's guilty plea:

> [The victim] was visiting a friend of his, John Scalf. He was visiting Mr. Scalf at Mr. Scalf's home . . . in East Nashville.

> While there, [the petitioner] came into the room. There became an argument [sic], whereas, [the petitioner] was claiming that [the victim] had sold him some drugs that were, in fact, fake. [The petitioner] became upset at [the victim], and . . . demanded his money back repeatedly.
>
> Mr. John Scalf would testify that the [petitioner] then took a knife out of his pocket and stabbed [the victim] in the chest. That stab wound was a fatal wound, that struck the aorta of [the victim]; and he died extremely shortly thereafter.
>
> The [petitioner] then fled from the scene, he disposed of the knife; and, according to his statement that he gave police, he then went to an outlying county, in order to avoid apprehension.

The petitioner filed a *pro se* petition for post-conviction relief on November 30, 2005, asserting that his plea was not voluntarily entered because he did not understand its nature or consequences and that he was denied the effective assistance of counsel. In support, he alleged that approximately one month after being incarcerated, officials at the Davidson County Criminal Justice Center placed him "on a regimen of potent anti-psychotic/anti-depressant/anti-manic/anti-convulsant drugs." He claimed that as a result of these medications he did not "understand the process that was going on" and would not have pled guilty if he had.

The post-conviction court subsequently appointed counsel, and an amended petition was filed on March 2, 2006, stating that the trial court should have "made further inquiry into the [p]etitioner's competence to enter a guilty plea once the [c]ourt had been informed that he had recently ingested prescription drugs" and that "the State of Tennessee is no less obligated to assure that a guilty plea is made with a knowing and intelligent waiver of constitutional rights, due process requiring it."

A hearing was held on March 3, 2006, at which trial counsel testified that he hired an investigator "to aid in [the petitioner's] defense" and thoroughly discussed the case with the petitioner. Counsel said that he met with the petitioner approximately seven times and that the investigator also talked to him "extensively." Initially, counsel was "encouraged . . . about a possible self-defense theory, until [he] was able to observe the autopsy reports, which showed the victim" had a defensive wound on his right arm.

Trial counsel said that he had represented the petitioner for eight or nine months before the petitioner decided to plead guilty. Asked if he noticed anything about the petitioner's behavior during that time period which caused him concern, trial counsel said "no." He said that the petitioner rejected the State's successive offers of thirty, twenty-five, and twenty-one years in exchange for a guilty plea until just before or during voir dire, at which time the petitioner "tapped [him] on the shoulder" and said he wanted to take the latter offer. Trial counsel affirmed that the petitioner appeared "to be asking questions that would show that he had [the] mental capability to . . . go forward with his trial on that day." He stated that they discussed the self-defense theory, the fact that "it was gonna [sic] be a jury question," and what the petitioner's potential release eligibility

percentage would be if he pled guilty. The petitioner told counsel that "after seeing the jury, he just didn't feel comfortable with going ahead with the trial and . . . wanted to take the deal." According to trial counsel, at no time before, during, or after the plea submission did the petitioner "appear to be out of it or confused in any way."

Robert Malloy, the custodian in charge of maintaining the medical records of inmates at the Davidson County Criminal Justice Center, testified that the petitioner's "Medication Administration Record" showed that in October 2003, he was taking Prozac, Thorazine, Tegretol, and Lithium, which are psychotropic medications prescribed for people with mental health problems. He confirmed that the petitioner's records showed that Depakote and Elavil were added to the petitioner's regimen the next month and that he was taking these six medications, in addition to Wellbutrin, three times a day through April 2005. However, on several occasions, the petitioner either refused or did not show up to take his medications. Malloy also testified that the petitioner's March 29, 2005, "Medication Renewal" document showed that his mental health providers renewed his medications through July 1, 2005. However, he did not have any records showing that the petitioner actually received any medication after April 30, 2005.

The petitioner testified that, beginning in September or October of 2003, he took several medications "basically every day." He said that occasionally he did not take his medications because he was "so overtook by them that [he] . . . couldn't really get outta [sic] bed to even get them." He explained that the medications made him sleep "like, eighteen hours a day" and caused him to be "real unfocused" and "confused," so that he "couldn't never remember nothing [sic]." He testified that he had never taken any "psychiatric" medications before being incarcerated when he became "really depressed" and asked to see a psychiatrist. He affirmed that, although it could not be verified through his medical records, he had taken his medications the morning he pled guilty.

The petitioner acknowledged that he stopped taking the medications once he "got to the prison" and said that he did not remember the conversation with trial counsel wherein he agreed to the twenty-one-year plea offer. Regarding his submission hearing, he said, "I remember being in the courtroom and seeing and hearing the [j]udge talk to me, but . . . I couldn't understand what he was – you know – understand what he was saying." He affirmed that the medications prevented him from understanding what he was doing when he entered his guilty plea. The petitioner said that he had difficulty remembering information in the discovery materials he read. He was able to recall, however, that the State had inadvertently included the names, addresses, and social security numbers of several people in those materials and that he had sent a letter to the prosecutor disclosing that fact in order to gain leverage in his case. Additionally, he acknowledged that he had previously pled guilty to charges of theft, aggravated assault, statutory rape, robbery, larceny and burglary.

On March 8, 2006, the post-conviction court denied relief and dismissed the petition, finding that "the petitioner entered into the plea agreement voluntarily, understandingly and intelligently." The petitioner appealed.

ANALYSIS

Standard of Review

On appeal, the petitioner raises the interrelated issues of whether the post-conviction court erred in finding that he received the effective assistance of trial counsel and that his guilty plea was knowing and voluntary.

The post-conviction petitioner bears the burden of proving his allegations of fact by clear and convincing evidence, Tenn. Code Ann. § 40-30-110(f) (2003), and when an evidentiary hearing is held, the post-conviction court's factual findings are conclusive on appeal unless the evidence preponderates against them. See Tidwell v. State, 922 S.W.2d 497, 500 (Tenn. 1996). Where appellate review involves purely factual issues, the appellate court should not reweigh or reevaluate the evidence. See Henley v. State, 960 S.W.2d 572, 578 (Tenn. 1997). However, review of a trial court's application of the law to the facts of the case is *de novo*, with no presumption of correctness. See Ruff v. State, 978 S.W.2d 95, 96 (Tenn. 1998). In addition, the issue of ineffective assistance of counsel, which presents mixed questions of fact and law, is reviewed *de novo*, with a presumption of correctness given only to the post-conviction court's findings of fact. See Fields v. State, 40 S.W.3d 450, 458 (Tenn. 2001); Burns v. State, 6 S.W.3d 453, 461 (Tenn. 1999).

To establish a claim of ineffective assistance of counsel, the petitioner has the burden to show both that trial counsel's performance was deficient and that counsel's deficient performance prejudiced the outcome of the proceeding. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984); see also State v. Taylor, 968 S.W.2d 900, 905 (Tenn. Crim. App. 1997) (noting that same standard for determining ineffective assistance of counsel that is applied in federal cases also applies in Tennessee). The Strickland standard is a two-prong test:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland, 466 U.S. at 687, 104 S. Ct. at 2064.

The deficient performance prong of the test is satisfied by showing that "counsel's acts or omissions were so serious as to fall below an objective standard of reasonableness under prevailing professional norms." Goad v. State, 938 S.W.2d 363, 369 (Tenn. 1996) (citing Strickland, 466 U.S. at 688, 104 S. Ct. at 2065; Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975)). The prejudice prong of the test is satisfied by showing a reasonable probability, *i.e.*, a "probability sufficient to undermine confidence in the outcome," that "but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694, 104 S. Ct. at 2068. In the context of a

guilty plea, the petitioner must show a reasonable probability that were it not for the deficiencies in counsel's representation, he would not have pled guilty, but would instead have insisted on proceeding to trial. Hill v. Lockart, 474 U.S. 52, 59, 106 S. Ct. 366, 370 (1985); House v. State, 44 S.W.3d 508, 516 (Tenn. 2001).

In support of his ineffective assistance of counsel claim, the petitioner argues that trial counsel was aware "that he was under the influence of several psychotropic medications and had been so medicated since shortly after his incarceration" that counsel should have made inquiries about these medications and their effects "before the plea hearing was allowed to proceed." On this point, the post-conviction court noted that trial counsel testified that he met with the petitioner on numerous occasions[1] and had no trouble communicating with him, that the petitioner appeared to understand and participated in conversations regarding the preparation of his case, and that the petitioner did not testify that he ever informed trial counsel about his medications. The court specifically accredited trial counsel's testimony and found that the petitioner failed to show prejudice by clear and convincing evidence.

We conclude that the record supports the post-conviction court's determination to accredit trial counsel's testimony and agree that counsel was not constitutionally ineffective.

In an interrelated claim, the petitioner also contends that "he was so heavily medicated that he was unaware of what he was doing during the plea." He asserts that he "spoke a total of only 83 words during the plea hearing," that thirty-six "of those were words such as 'yes' or 'no' and most of the rest of those words were an explanation that [he] was on medication," and that "this very brief exchange in open court could hardly have reasonably satisfied either the trial court, trial counsel or the State [of the] voluntariness of his plea."

When analyzing a guilty plea, we look to the federal standard announced in Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709 (1969), and the state standard set out in State v. Mackey, 553 S.W.2d 337 (Tenn. 1977). State v. Pettus, 986 S.W.2d 540, 542 (Tenn. 1999). In Boykin, the United States Supreme Court held that there must be an affirmative showing in the trial court that a guilty plea was voluntarily and knowingly given before it can be accepted. 395 U.S. at 242, 89 S. Ct. at 1711. Similarly, the Tennessee Supreme Court in Mackey required an affirmative showing of a voluntary and knowledgeable guilty plea, namely, that the defendant has been made aware of the significant consequences of such a plea. Pettus, 986 S.W.2d at 542. A plea is not "voluntary" if it results from ignorance, misunderstanding, coercion, inducements, or threats. Blankenship v. State, 858 S.W.2d 897, 904 (Tenn. 1993). The trial court must determine if the guilty plea is "knowing" by questioning the defendant to make sure he or she fully understands the plea and its consequences. Pettus, 986 S.W.2d at 542; Blankenship, 858 S.W.2d at 904.

[1] The court also observed that trial counsel's "time computations filed with the [c]ourt and the Administrative Office of the Courts indicate that he spent 124 hours representing this petitioner with approximately 14 hours being spent directly with the petitioner."

Because the plea must represent a voluntary and intelligent choice among the alternatives available to the defendant, the trial court may look at a number of circumstantial factors in making this determination. Blankenship, 858 S.W.2d at 904. These factors include: (1) the defendant's relative intelligence; (2) his familiarity with criminal proceedings; (3) whether he was represented by competent counsel and had the opportunity to confer with counsel about alternatives; (4) the advice of counsel and the court about the charges against him and the penalty to be imposed; and (5) the defendant's reasons for pleading guilty, including the desire to avoid a greater penalty in a jury trial. Id. at 904-05.

At the outset of the submission hearing, the following exchange occurred between the trial court and the petitioner regarding the effect his medications had on his awareness:

> THE COURT: Are you currently under the influence of any alcohol or drugs?
>
> THE [PETITIONER]: I'm on medication. I take – take thirty pills a day. I'm on Thorazine, and I'm on other . . . Tegretols [sic].
>
> THE COURT: All right. Do those medications in any way affect you from – prevent you from understanding what I'm asking ?
>
> THE [PETITIONER]: I can read something, and then I forget it later on.
>
> THE COURT: But do you understand what you're here doing today?
>
> THE [PETITIONER]: Yeah.
>
> THE COURT: What is your understanding of that?
>
> THE [PETITIONER]: Taking a plea bargain, twenty-year[2] [sic].
>
> THE COURT: All right. If at any time there's some question I ask, that you don't understand, then ask me about it. I will explain it, or you can speak with your attorney.

The post-conviction court concluded that, based on the exchange between the petitioner and the trial court during his plea colloquy (specifically the effect his medications had on his awareness) that he voluntarily, understandingly, and intelligently decided to plead guilty. The record on appeal supports this determination.

[2] Later in the hearing, as he and the trial court discussed release eligibility, the petitioner clearly acknowledged that he would be serving "twenty-one calender years."

CONCLUSION

Based on the foregoing authorities and reasoning, we affirm the post-conviction court's order of dismissal.

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ALAN E. GLENN, JUDGE